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IN THE

Supreme Court of the United States

1971 TERM

NO. 69-5003

WILLIAM HENRY FURMAN,
Petitioner,

v

GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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Annals of Congress, Vol. II, Appendix pp. 2274, 2281 . . 86

Bedau, H., The Death Penalty in America, (Rev. ed 1967) p. 120. 51

City of Atlanta, Department of Police, 91st Annual Report, Dec. 31, 1970 . . . 80

Cohen, B. Law Without Order (1970). 51

Erskine, 34 Pub Op Q (1970-71) 60

Farrand, The Records of the Federal Convention of 1787, Vol. I, Yale University Press 1934 85

Georgia House Study Committee Report, 1968 House Journal, p. 3451. 59

Georgia Senate Study Committee Report, 1966 House Journal, p. 2669. 59

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Good Housekeeping, November 1969, vol. 169, p. 24 . . . 61

Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate on S. 1760, March 20, 21, and July 2, 1968... 58

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Nation's Business, November 1970, vol. 58, p. 28. . . . 60

Newsweek, January 11, 1971, pp. 23, 24, 27. 58

Pennington, John, "The Death Penalty: Have We Walked the Last Mile?", Atlanta Journal and Constitution, Aug. 30 and Sept. 6, 1970 75

OTHER AUTHORITIES--continued

Perry and Cooper, Sources of Our Liberties, American Bar Foundation, 1959. 85

Rutland, The Birth of the Bill of Rights, 1776-1791, University of North Carolina Press, 1955 75

Time, April 15, 1966, vol. 87, p. 40. 50

United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968) 47

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions recited by Petitioner, this case involves also certain Georgia statutes and published Rules of the State of Georgia Board of Corrections, each of which is set forth

as Appendix A to this Brief [hereinafter cited as "App. A, pp. ____] at App. A, pp. 1a - 16a *infra*.

QUESTION PRESENTED

> "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

STATEMENT OF THE CASE

William Joseph Micke, Jr., age 29, died on August 11, 1967, at his home in Savannah, Georgia, as the result of a bullet being shot through his lung and producing severe hemorrhaging (A. 17, 18, 32). The unprovoked shooting occurred as follows: Micke and his wife retired to bed sometime after midnight, when he returned from his initial night of work at a second job taken to supplement the family income. Mr. Micke's primary employment was with the United States Coast Guard (A. 18). The young family included five children, ranging in age from one year to fifteen years (A. 17). Between 2:00 and 2:30 a.m., before falling asleep, the Mickes heard noises and, thinking it was 11-year-old Jimmie sleepwalking, Mr. Micke went to get Jimmie back to bed (A. 18, 19).

Mrs. Micke, listening, heard her husband's footsteps quicken. Then she heard a loud sound and her husband's scream (A. 19). Believing then that someone was in the house because of Mr. Micke's cry, and fearful that someone else was also in the house, and afraid that her children might be harmed, Mrs. Micke ran to the bedrooms for the children and gathered them into her bedroom in an effort to protect them (A. 19, 21, 22). She and the children then screamed for their neighbor, she realizing that she had no gun or other means to defend against an intruder (A. 19, 22). She called the police as soon as she saw Mr. Dozier, the neighbor, come out of his house (A. 19), but her hysteria prevented the police from learning what the disturbance was (A. 24). Sergeant Spivey, who was just one or two blocks away from the Micke home when the call came at about 2:23 a.m., went immediately there and was met by Mr. Dozier out front (A. 24, 26). They thought an intruder was still in the house, so Sergeant Spivey checked the front door and, finding it locked, went around to the back door.

The back of the house was dark, and when the officer tried the back door, it opened (A. 24-25). Shining his flashlight into the house, he saw Mr. Micke's body lying on the floor with a large puddle of blood around the head and shoulder (A. 25). Still thinking there

was an intruder in the house, the officer crawled through the rooms and found no one other than Mrs. Micke and the children locked in a front bedroom (A. 25). Upon doubly checking Mr. Micke's vital signs, Sergeant Spivey concluded that he was dead. Other policemen arrived, an ambulance was called, and an investigation begun (A. 26).

Officers Hall and Goode and others immediately scanned the area in a search for the assailant (A. 37, 41). Hall stationed himself at the far end of a wooded area next to the Micke house, in his patrol car with the lights off and motor running (A. 38). Petitioner came out of the woods and when he saw the patrol car, he walked faster and then started to run (A. 38-39). Hall and other officers pursued, finally on foot, and traced Petitioner's tracks to the nearby home of his uncle (A. 39). After obtaining the uncle's permission to search the area, the officers located Petitioner hiding under the house and pulled him out by the hand (A. 39, 40, 41). A search was made of Petitioner and a .22 caliber pistol, which was later identified as having discharged the bullet which killed Mr. Micke, was taken from his right front pocket (A. 40-43, 49, 50; R. Transcript 67-71). No other civilian was seen out in the area during the course of the search (A. 40).

Detective Smith testified (after a voluntariness hearing before the court in the absence of the jury and after the court concluded that the statements were not inadmissible on that account [A. 44, 46]), that on the same day and following an explanation of Petitioner's rights to him [1] and his indication that he did not then want a lawyer, the detective said he had one question, which was: ". . . did he get inside of the house" (A. 47). Petitioner's reply, he said, was:

> "A. He state yes, that he was in the kitchen; the man come in the kitchen, saw him in there and attempted to grab him as he went out the door; said the man hit the door, instead of catching him, he hit the door, the door slammed between them, he turned around and fired one shot and ran." (A. 47).

The investigation at the Micke home, commenced while Officers Hall and Goode and others were searching for the assailant (A. 26, 29, 33, 37, 41) yielded latent fingerprints on a washing machine on the back porch which were later deter-

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[1] Officer Goode testified that his constitutional rights were also read to him upon arrest (A. 42).

mined to have been made by Petitioner (A. 28, 33, 37). The inch-thick plywood door which lead from the small porch to the kitchen where Mr. Micke's body was found, contained a bullet hole (A. 27, 29), the appearance of which indicated that the bullet came into the house (A. 27, 30). Mrs. Micke testified that the door had been locked (A. 20). It appeared that the washing machine had been pulled away from a window, a fan moved, and the door unlocked on the inside by slipping a hand through the window (A. 20, 21, 27, 28, 31).

After the State presented its case, Petitioner's counsel (who has been counsel throughout the proceedings and up to the present time) asked that the jury be excused and that the defendant be called to determine, on the record, whether he then wished "to make a sworn or unsworn statement or no statement at all." (A. 50). This was done (A. 50).2/

2/ Georgia law gives a criminal defendant these three options. Ga. Laws 1962, p. 45; Ga. Code Ann. § 27-405, App. A, p. 6a. See also Ga. Laws 1962, pp. 133-135, Ga. Code Ann. § 38-415 and -416.

Petitioner verified that his attorney had discussed these three alternatives with him and advised him in this regard, and that it was his decision not to make a statement (A. 51). After further explanation by the court and his attorney, in which it was emphasized that he could make either a sworn or an unsworn statement, the court asked: "Do you want to tell this jury anything?" The defendant then said, "Yes". (A. 52, 53). He reiterated this desire before the jury, and after his attorney instructed him to "Give your name, your age and everything else about you," the following transpired:

"The Defendant: William Henry Furman.

"Mr. Mayfield: Speak a little louder, please.

"The Defendant: William Henry Furman. I am twenty-six. I work at Superior Upholstery.

"Unidentified: Where?

"The Defendant: Superior Upholstery.

"Mr. Mayfield: Speak loud enough now for everyone to hear you and hear you clearly.

"The Defendant: They got me charged with murder and I admit, I admit

going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it.

"Mr. Mayfield: Now, do you have anything else you want to tell this jury about this case?

"The Defendant: Yes, sir, one other thing; they didn't -- questioned me down there, down there at the police station, they didn't told me nothing about a lawyer and I told them who I wanted as an attorney and they still asked me questions and I wouldn't answer none. That's -- that's all I've got to say.

"Mr. Mayfield: Anything else you want to say now?

"The Defendant" That's all.

"Mr. Mayfield: You may come down.

Note: (The defendant withdrew from the witness stand.)" (A. 54-55).

Before the trial commenced, a motion o suppress evidence was heard and denied, motion challenging the array of the jury enire was submitted upon stipulation of ranscript from another case, and other efense motions were made and denied (R. -15, R. Transcript 2, 2-a, 11A through 1 BE; A. 11, 12).

In obtaining a panel of forty-eight ualified jurors, only one person was dis-ualified, and thus required replacement, or answering that he would refuse to im-ose capital punishment in a case regard-ess of the evidence (A. 12-15).

The trial was held on September 20, 968 (A. 10), the homicide having occur-ed on August 11, 1967 (A. 17). The apse of time was occasioned by defen-ant's attorney having moved for psychi-:ric examination and evaluation at an stitution designated by the court and State expense so that the jury could ve the information in determining guilt innocence and proper punishment (A. 6). October 24, 1967, the court granted the tion inadvertently referring to it as a ecial plea of insanity, and ordered fendant sent to Milledgeville (Central) ate Hospital for examination (A. 8).

By the terms of the order, the findings were to be sent to the court, the solicitor general, and defendant's counsel. Defendant was returned to the court in April, 1968, as being competent to stand trial, it having been determined that he was not psychotic, knew right from wrong, and was able to cooperate with his counsel in preparing his defense (Petitioner's Brief, Appendix B, p. 3b).

No further reference was made to any insanity, either in terms of a defense or in terms of being competent to stand trial. Despite all of the pre-trial and post-trial activity which marks the course of this case, the subject did not arise until after this Court granted certiorari and preparations for the appendix began (Petitioner's Brief, App. B, p. 1b). Contrary to the assertion putting the blame for omission of the "reports" on the trial court clerk, the law clearly imposes this duty of perfecting the record on the party contending the record is incomplete, in this case, the Petitioner. Ga. Laws 1965, pp. 18,24; Ga. Code Ann. § 6-805(f), App. A. p. 1a. Respondent knows of no requirement that the clerk include in the record more than is recorded in his office.

The merits of the new assertions regarding Petitioner's mental condition are palpably suspect since, although

trial counsel pressed an appeal before the Georgia Supreme Court and was thus responsible for drawing up the enumeration of errors and supporting brief based on the record, the absence of the letters was not even noticed or thought important enough to be made a part of the record at that stage, as may be done in accordance with appellate practice. Ga. Laws 1964, pp. 18, 24, supra.

Petitioner, in his Statement of the Case, refers to the characterization of the crime given in the opinion of the Georgia Supreme Court (Petitioner's Brief, p. 6). That Court, in section 6 of its opinion (A. 67, 68), ruled that the general grounds of the motion for new trial 3/ were not meritorious.

3/ That is, contentions that the verdict was contrary to evidence and without evidence to support it; that the verdict was decidedly and strongly against the weight of the evidence; and that the verdict was contrary to law and the principles of justice and equity. See R. 20.

The reason was that the evidence was sufficient to show either implied malice [4] or at least the death occurring in the commission of a felony. [5]

Contrary to Petitioner's comment, Georgia law at the time of his conviction, and still now, divides crimes of homicide into three categories: murder [6],

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[4] Ga. Code Ann. § 26-1004: "Implied Malice. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Cobb, 783." This now comprises § 26-1101(a) of the Code of Georgia, effective July 1, 1969. (Petitioner's Brief, App. A, p. 4a)

[5] Illustrated, as the Court notes, by Williams v. State, 222 Ga. 208 (1966) and Manor v. State, 223 Ga. 594(1967) This type of murder is now defined in the Criminal Code of Georgia, § 26-1101(b). (Petitioner's Brief, App. A, p. 4a).

[6] Formerly Ga. Code Ann. § 26-1002, now Criminal Code of Georgia § 26-1101. (Petitioner's Brief, App. A, p. 1a, 4a).

voluntary manslaughter [7], and involuntary manslaughter [8]. The Committee Notes which accompany the new Criminal Code of Georgia effective July 1, 1969, discusses the decision not to divide the offense of murder into degrees:

> "An examination of murder legislation in operation in 30 States discloses that six jurisdictions (Illinois, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas) follow the Georgia pattern of dividing homicide into murder, voluntary, and involuntary manslaughter, with separate definitions of these offenses. The remaining 24 States, approximately 80 % of the jurisdictions studied, in addition to having statutes dealing manslaughter, divide murder into degrees for purposes of prosecution and punishment. . . .
>
> * * *

7/ Formerly Ga. Code Ann. § 26-1002, now in Criminal Code of Georgia, § 26-1101. (Petitioner's Brief, App. A, pp. 1a, 4a).

8/ Formerly Ga. Code Ann. § 26-1009, now in Criminal Code of Georgia, § 26-1103. (Petitioner's Brief, App. A, pp. 2a, 4a).

> "While more than three-fourths of the States divide the offense of murder into degrees, primarily to facilitate punishment, Georgia has always followed the common-law view of a single definition. Illinois and Louisiana, which have recently enacted criminal Code legislation, have adopted the definitional classification of homicide similar to the method presently employed in Georgia. The Model Penal Code Proposed Official Draft approves and utilizes the single definition (Section 201.2)." Committee Notes, Criminal Code of Georgia, 1970 Revision, p. 84.

Thus, Georgia submits to the jury trying the case the discretion to fix the punishment at death in a murder case, and does not limit its consideration by classifications of degree. The value of any life ended by murder is thus given the same weight insofar as the maximum penalty imposeable is concerned. The myriad of variables attendant to each case is left to consideration of the jury, representing the community, as to which murder cases appropriately call for the death penalty.

Petitioner states, as a footnote, his Amended Motion for New Trial challenged a certain jury instruction re-

garding felony murder (Petitioner's Brief p. 7, fn. 4). He did not object to the instruction when given (A. 64).

He states that he incorporated the challenge by reference into the Enumeration of Errors which formed the basis of appeal to the Georgia Supreme Court, but it appears there only thusly:

> "7. That the Court erred in one and all of the respects set out in the amended Motion for New Trial and for the reasons set forth thereon." Enumeration of Errors dated March 27, 1969, p. 2 (Not paginated in original record in this Court and not included in printed Appendix.).

The Supreme Court of Georgia does not consider enumerations not briefed or argued. Schmid v.State, 226 Ga. 70 (1970). And it is abundantly evident that Petitioner did not assert the matter below at all, as at the conclusion of the Georgia Supreme Court's opinion, it is stated:

> "7. Having considered every enumeration of error argued by counsel in his brief and finding no reversible error, the judgment is Affirmed." (A. 68).

Consequently, Petitioner can raise no inference or implication that any issue in this regard was properly raised.

Petitioner refers to "additional facts" concerning him which the jury did not know but which "appear in the record" (Petitioner's Brief, pp. 8-9). That these "facts" are not a part of the record and were not a part of the record before the court below has already been pointed out. It is further noted that the "facts" alluded to, i.e., results of psychiatric examination, were readily available for disclosure to the jury, had Petitioner's counsel deemed it favorable to the defendant to make such a revelation. The letters are dated February 28, 1968, and April 15, 1968 (Petitioner's Brief, App. B, pp. 2b and 3b), long before the trial on September 20, 1968, and it is obvious from their content that defense counsel would not have chosen to make the jury aware of their substance. There is no basis whatsoever for Petitioner's bald statement that the two letters "indicate that Petitioner Furman is both mentally deficient and mentally ill." (Petitioner's Brief, p. 9). The lately contrived "issue" of insanity is further dealt with in this Argument, infra, p. 88 et seq. The facts concerning the same are simply recited here, in refutation of Petitioner's erroneous Statement of the Case in this regard.

Contrary to Petitioner's statement, he was not "committed" to Central State Hospital upon a special plea of insanity.

There was no such special plea of insanity, which would have ultimately required a jury determination of competency to stand trial, such as occurred in Jackson's case. See Jackson v. Georgia, No. 69-5030, A. 12, 13, 17, 18, 21; 33. Instead, counsel simply moved for psychiatric examination, at State expense, to be used for purposes of defense and possibly for sentencing (A. 6). As indicated heretofore, the court in granting the motion inadvertently referred to it as a plea of insanity, but none was ever filed nor did counsel ever make any issue of competency to stand trial.

Petitioner also asserts an erroneous conclusion regarding the meaning of the second letter: the Hospital did not report on April 15, 1968, that he was THEN diagnosed identically as he had been diagnosed on February 28. Instead, the letter merely repeated the earlier diagnosis as having at one time been made, and it then goes on to say that the present condition is different. There is no basis for concluding, as Petitioner inferredly attempts to, that the Hospital deliberately sent back for trial a man who had some mental condition which should have legally avoided trial and sentencing.

SUMMARY OF ARGUMENT

THE IMPOSITION AND CARRYING OUT OF THE DEATH PENALTY IN THIS CASE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Fourteenth Amendment, by virtue of which cruel and unusual punishment forbidden by the Eighth Amendment is a prohibition against the states, provides that the states may not deprive any person of life without due process of law. Conversely, the states may deprive a person of life so long as the mandates of due process of law are observed. The Eighth Amendment, adopted as part of a declaration of rights to confine the federal government, may not effect a curtailment of a right of the states recognized by the states-restricting Fourteenth Amendment.

The Eighth Amendment does not prohibit the penalty of death for crime, in that such a penalty was historically acceptable in the context of the period in which the Amendment was adopted, has thereafter traditionally been a part of the penal system in this country, and is widely accepted today as a reasonable, rational, and appropriate

instrument in the control of crime. It is not a punishment that is prohibited as constitutionally "cruel and unusual." The function of State legislatures to define crimes and fix punishments is therefore not restricted against providing such a punishment.

This case is devoid of any issue concerning the sanity of Petitioner.

There is no constitutional barrier to the imposition and carrying out of the death penalty in the case at bar.

ARGUMENT

I

THE DEATH PENALTY FOR MURDER IS NOT PER SE CRUEL AND UNUSUAL, IN THE CONSTITUTIONAL SENSE, AND IS THEREFORE NOT A DEPRIVATION BY THE STATE OF PETITIONER FURMAN'S LIFE WITHOUT DUE PROCESS OF LAW.

The Court has framed the question for examination to be, whether the imposition and carrying out of the death penalty in Furman's case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner contends that his sentence is a rare, random, and arbitrary infliction and for that reason is prohibited by the Eighth Amendment principles briefed in Aikens v. California, No. 68-5027. He states therein that the Due Process Clause of the Fourteenth Amendment is "involved" 9/, but he makes little or no reference to it thereafter, traveling instead on the assumption that the Eighth Amendment is incorporated into the Due Process Clause and so it need

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9/ Aikens Brief, p. 2.

only be examined in terms of the former. However, since the Eighth Amendment is not, alone, applicable to the States and was not applicable to them in any sense before the adoption of the Fourteenth Amendment in 1868, the question at issue must be reviewed in the context of the latter's requirements. The Eighth Amendment imposes no restrictions on the States, but the Fourteenth Amendment does. The Due Process requirements will therefore be developed as the appropriate arena in which to focus on the cruel and unusual punishment question.

The Fourteenth Amendment Due Process Clause guarantees:

> "(N)or shall any State deprive any person of life, liberty or property without due process of law; . . ." (Emphasis added).

It does not prohibit a State from depriving a person of life, but rather the prohibition is that it shall not be done without due process of law. Thus, the Nation saw fit, one hundred years ago, to give constitutional permanence to the right of every person to demand due process before his life could be forfeited by the State. The mandates of this clause, in terms of cruel and unusual punishment, has been stated variously:

In Ex parte Kemmler, 136 U.S. 436 (1890) the Court explained:

> "[I]n the Fourteenth Amendment, the same words [due process of law] refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the Amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it [the Fourteenth Amendment] was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order." Id. at 448.

Kemmler complained that the form of the death penalty, electrocution, was

cruel and unusual and therefore a deprivation of life without due process of law. The Court concluded that in order to reverse the New York highest court, it would ". . . be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime." Id. at 448. Petitioner's complaint faces the same test because in order to prevail, it, too, must evidence a denial of substantive due process: whereas Kemmler challenged the form of infliction, i.e., electrocution itself, rather than the procedure for inflicting it, Petitioner challenges the punishment, i.e., the death penalty, itself, rather than the procedure by which it was imposed on him.

In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), the circumstances of execution were complained of as cruel and unusual punishment. Thus, procedural due process was the frame. Mr. Justice Frankfurter developed the concept of the due process safeguard in a concurring opinion and said it is part of "the conceptions of justice and freedom by a progressive society." Id. at 467.

> "The Fourteenth Amendment," he wrote, "did mean to withdraw from the States the right to

> act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom." Id. at 468.
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> "In short," he continued, "the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr. Justice Cardozo, 'in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. at 469.

This context, then, is the proper one in which the Court is to review State penal laws, with respect to whether they are cruel and unusual. The question of the moment is whether the death penalty offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. This test looks to the solid past, as well a constitutional inquiry should, rather than simply to the shifting present, which Petitioner presses with his emphasis on a test of "evolving standards."

Measured by this due process test, it is indisputable that the death penalty for crimes which immediately endanger or

take life does not offend a rooted principle of justice. The existence and application of the death penalty itself has been an integral part of our penal systems since at least Colonial days, although, as Justice Burton pointed out in dissent in the Louisiana case, torturous means and forms of inflicting death is prohibited as shocking fundamental instincts of civilized man. Id. at 473.

Since due process standards are very broadly conceived, Mr. Justice Frankfurter cautioned, "great tolerance toward a State's conduct is demanded of this Court." Id. at 470. The State does not assert that its position in this case cannot be maintained without a great tolerance being shown by the Court, but rather points up this concept to illustrate the foreshortened framework of Petitioner's premise.

Although Solesbee v. Balkcom, 339 U.S. 9 (1950) is not a punishment case, it involves an application of the Due Process Clause. The question was whether the method applied by Georgia to determine the sanity of a convicted defendant offended due process. The Court held that the statute as applied did not do so. Mr. Justice Frankfurter, who dissented, again exhaustively reviewed the meaning of the Due Process Clause. The rule against

executing an insane person is "protected by substantive aspects of due process," he noted. (Id. at 24). This conclusion followed from an application of the substantive aspect of due process, which was phrased thusly:

> "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." Id. at 16.
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> "In applying such a large, untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions." Id. at 16.

The distinction between substantive and procedural due process which was there made was that substantive due process prohibited killing an insane man, whereas procedural due process required that where a question of

sanity arises, the prisoner must be given the opportunity to show that he is otherwise. This distinction illustrates that Petitioner's argument, as embodied in the Aikens Brief, must be construed to be that the death penalty violates substantive due process, because the theory is that any execution actually inflicted in our contemporary society would be unconstitutional.

Trop v. Dulles, 356 U.S. 86 (1958) is strictly an Eighth Amendment case because of its federal character. Due process considerations did not enter in. Therefore, Petitioner's lifting of the test suggested in that case and his primary reliance thereon distorts the question in this case. Its adaptability to the present situation must be circumscribed by the superimposition of the broad limits in which due process allows the States to operate.

Petitioner, moreover, makes the Trop test unworkable in a judicial setting by construing it narrowly. The evolving standards of decency, he says, are ones which are current and can be measured by contemporary statistics and public opinion indicators and world-wide "trends". Such a close-to-pocket construction of the Trop language not only fails to take into account the changes of tomorrow but refuses to acknowledge

the judicial setting in which it must be applied. Petitioner's brief is replete with partial statistics, assertions of unconfrontable "experts", and all types of "objective indicators" which allow not of cross-examination and which are not subject to the rules of evidence. It is submitted that the standards intended by the statement that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" 10/ are standards of fundamental significance and capable of demonstration to a judicial body that is confined to the evidence in the record of a case and is not equipped with the facilities for factual investigation and the gathering of conflicting evidence which a legislative body would have. The scope and magnitude of the "evidence" proffered by Petitioner itself bespeaks an attempt that would more fittingly be directed to a legislature. The Court, as a matter of fact, has on more than one occasion with respect to penalties, pointed this out: see dissent of Mr. Justice White, concurred in by Mr. Justice Holmes, in Weems v. United States, 217 U.S. 349, 384 (1910); dis-

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10/ 356 U.S. at 101.

sent of Mr. Justice Clark in Robinson v. California, 370 U.S. 660, 682, 683 (1962); dissent of Mr. Justice White in Robinson v. California, supra, 370 U.S. at 689. At the least, the Court has taken cognizance of the comprehensive task involved in reaching the conclusion that a legislatively defined crime or legislatively fixed punishment is unconstitutional:

> "And for the proper exercise of such power [judicial power to judge the exercise of legislative power] there must be a comprehension of all that the legislature did or could take into account, -- that is, a consideration of the mischief and the remedy." Weems v. United States, supra, 217 U.S. at 379.

The standard, then, is the much broader one implicit in "the dignity of man"; it requires only that the power to punish "be exercised within the limits of civilized standards". Trop v. Dulles, supra, 356 U.S. at 100. The overriding applicability of the Fourteenth Amendment due process concept, which was absent in the Trop and Weems tests, is present in Robinson v. California, supra, 370 U.S. 660 (1962). There the Court concluded that it was "doubtless" that a law which made a criminal offense of a disease would universally be thought to be cruel and unusual

punishment in violation of the Eighth and Fourteenth Amendments. 11/ The fundamental character of the condemnation is therefore the gauge.

The narrow construction which Petitioner puts on "contemporary human knowledge", "public opinion enlightened by humane justice", and "evolving standards of decency that mark the progress of a maturing society", also fails prey to one of his own arguments. The United States Constitution is, to be sure, a vital organ which must be interpreted with deference to its elastic nature. This does not mean, however, that it may be construed solely to fit today's needs, desires and best judgment. That is employment more appropriate to laws, which can be made today and changed, modified, altered, amended, or repealed tomorrow. Laws can be experimented with. But the Constitution remains as it stands, subject only to infrequent and difficult-to-achieve amendment. If the Court were to construe the foundation document in terms of current world or national opinion, and assuming for the sake of argument that Petitioner has demonstrated total contemporary rejection

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11/ 370 U.S. at 666.

of the death penalty, the constitutional invalidation of capital punishment would remove it foreover as a penal sanction in this country, absent constitutional amendment.

Such finality should not be imposed when it has not been shown that the death penalty serves no legitimate purpose and, even more importantly, when no one can yet imagine the types or magnitudes of crimes that will surely evolve in future generations. Who, for example, envisioned twenty years ago that our society plagued with gun-point airplane highjacking, would find it necessary to define a new crime, commonly referred to as "skyjacking", and provide as a maximum the death penalty? 12/ Who today can imagine the new and more broadly sweeping crimes that can evolve in the increasingly complex, mobile, speeding, technological, interdependent society in which we live? It is all too well known that the flip of a switch can destroy millions. As the Court succinctly stated in Weems v. United States, 217 U.S. 349 (1910):

12/ See Ga. Laws 1969, p. 741; Criminal Code of Georgia § 26-3301. (App. A, p. 5).

> "The future is their (constitution's) care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be." Id. at 373.

Note also that this statement immediately succeeds the Court's observation that the death penalty was not meant to be excluded by the Eighth Amendment prohibition.

The penalty here sought to be outlawed should be abolished by the law makers, if such a penalty is currently unacceptable as Petitioner says. Then, if ever again thought useful or necessary, it could likewise be reinstated. Experience would then provide a knowledgeable guideline by a number of states which at one time elected to abolish the penalty. 13/ But to ban it as a matter of constitutional imperative is not only unjustified in terms of its present posture but is also dangerous in terms of its future use. As it was pointed out on pre-

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13/ United States Department of Justice, National Prisoner Statistics Bulletin, Number 45, August, 1969, Table 15, p. 30 [hereinafter cited as NPS].

vious occasions, the power of the legislature to define crimes and their punishment must yield only to a constitutional prohibition:

> "The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interferred with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency." Weems v. United States, supra, 217 U.S. at 379.

The same principle is reiterated in Trop v. Dulles, supra, 356 U.S. at 103:

> "Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids."

And more recently in McGautha v. California, 402 U.S. 183 (1971):

> "Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. Rather it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases." Id. at 195.

In the instant case, the antagonist to the traditional penalty has not only failed to show that it is constitutionally forbidden but even that it is unwise. Fundamental requirements of fairness and decency are what the Due Process Clause embodies, [14] and it is that bedrock standard which Petitioner must show capital punishment contravenes. It is abundantly evident that he has not proved his case.

Emphasis has been given to the due process setting in which the claim of cruel and unusual punishment must be viewed. This is not to deny that judicial measurements of Eighth Amendment cruel and unusual punishment are not to be applied. Indeed they are, as is illus-

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14/ McGautha v. California, supra, 402 U.S. at 215.

trated by at least as early a case as Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 463 (1947).

The test of whether punishment is cruel and unusual in the constitutional sense has been variously stated in differing circumstances. In attempting to ascertain the meaning of the Eighth Amendment clause in the federal case of Wilkerson v. Utah, 99 U.S. 130 (1879), the Court in part measured the mode of execution by the proposition that the Constitution forbids punishments of torture and all others in the same line of unnecessary cruelty. In that regard, death by electrocution does not fail the test. Ex Parte Kemmler, supra. Even Petitioner concedes as much. 15/

"Punishments are cruel", the Court said in Kemmler, "when they involve torture or a lingering death; . . . something inhuman and barbarous . . ." Ex parte Kemmler, supra, 136 U.S. at 447.

15/ Aikens Brief, App. I, p. 9i: "Under correct application," electrocution "insures a death that is both instantaneous and painless."

The meaning of cruel and unusual punishment was subsequently expanded and liberalized to cover a broader spectrum. Mr. Justice Field, in dissent in O'Neil v. Vermont, 144 U.S. 323 (1892), precursed the concept that the inhibition is directed not only against punishments of a torturous character, "but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Id. at 340. The punishment imposed in that case was, in Field's opinion, "a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering." Id. at 340. So measured, the punishment which has over the past several years been imposed by juries to at least most, if not all, of the approximately 660 persons now under death penalty in this country, cannot be said to be excessive in terms of the right feeling and heart of any man.

The Court in Howard v. Fleming, 191 U.S. 126 (1903) declined to set out a rule for determining what punishment is cruel and unusual or under what circumstances the Court would interfere with the decision of a state court in respect thereto. Reference was made instead to Ex parte Kemmler, supra.

The Court did say, however, that "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one." Howard v. Fleming, supra, 191 U.S. at 136. By that measurement, the penalty in the cases sub judice will stand.

The excessiveness concept outlined by Mr. Justice Field in O'Neil, supra, was applied in Weems v. United States, 217 U.S. 349 (1910). After reviewing the history of the cruel and unusual punishment clause and the judicial pronouncements concerning it, the Court concluded that the punishment provided by statute in Weems was cruel in its excess and unusual in its character. Thus, because of its degree and because of its kind, it was deemed invalid. Petitioner here, too, challenges the statutory punishment itself, rather than merely its application in his case. He says in effect that it is per se cruel and unusual. He assumes that it is "cruel" and directs his attention to an attempt at showing that it is also "unusual."

But is the death penalty excessive, that is, cruel, per se for murder and other crimes that take, or clearly and presently endanger, innocent life? It is inconceivable that in our system of justice the victim should be compelled

to suffer more than the attacker. The death penalty has always been regarded by this Court as constitutionally allowable as a punishment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life." Ex parte Kemmler, supra, 136 U.S. at 447.

Lest there be any doubt as to the meaning of that statement, the Court in Weems, supra, 217 U.S. at 370-371, explained:

> "It was not meant in the language we have quoted to give a comprehensive definition of cruel and unusual punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death cruel and unusual, though of itself it is not so."

Mr. Justice Burton repeated this precept with approval in his dissent in Louisiana ex rel. Francis v. Resweber,

supra, 329 U.S. at 463, footnote 4. More recently it was said:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." Trop v. Dulles, supra, 356 U.S. at 99.

Mr. Justice Black's concurring opinion in McGautha v. California, supra, makes it plain:

> "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the Framers intended to end capital punishment by the Amendment. Although some people have urged that

> this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power. See Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting)." Id. at 226.

It is not pretended that previous pronouncements foreclose the question. However, the consistent views expressed over the years by this Court on this subject illustrate that the death penalty is not an unacceptable punishment. It cannot be said that these views do not give expression to that common standard of decency required of punishment in our society by humane justice, or that they must be abandoned because contemporary human knowledge has rendered the death penalty constitutionally "unusual".

Returning to the meaning of the cruel and unusual punishment clause and its previous construction by this Court, which serves to instruct as to its appropriate application in this case, the Weems definition was reiterated in the later federal case of Trop v. Dulles, supra, 356 U.S. at 100. The Eighth Amendment merely circumscribes the power to punish so that it does not exceed "the limits of civilized standards."

Id. at 100. The punishment of denationalization for even a minor desertion in wartime was found to exceed these limits because it destroyed the political existence of the individual and his right to have rights. It was found to be excessive, contrary to "the dignity of man." The death penalty, when so measured, withstands the test. Execution is a traditional penalty which may be imposed depending on the enormity of the crime, the Court in Trop noted. Id. at 100. It is submitted that the Petitioner has failed to carry his burden of showing that the death penalty is no longer clothed with validity. His primary assertion is that capital punishment has now become unusual in a constitutional sense because of the rarity of actual execution, and that that rarity proves its unacceptability in terms of "evolving standards of decency." The failure of his proofs to substantiate his claim is demonstrated subsequently.

"Unusual", that aspect of the clause to which Petitioner directs the weight of his argument, was given particular attention in footnote 32 of the Trop decision. Without concluding whether the word "unusual" should be given an independent meaning, it was observed that the Court:

> ". . . simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'"

Going on, the Court suggested that:

> "If the word 'unusual' is to have any meaning apart from the word 'cruel', however, the meaning should be the ordinary one, signifying something different from that which is generally done."

And why did the Court regard denationalization as "unusual" in this sense? Because:

> "[i]t was never explicity sanctioned by this Government until 1940 and never tested against the Constitution until this day." Trop v. Dulles, supra, 356 U.S. at 100, fn. 32.

The death penalty on the other hand, has always been sanctioned in this country and is still sanctioned by the vast majority of jurisdictions here. It was such an integral part of the penal system when the Amendment was adopted that there

was not even a question so far as Respondent can find, in Congress or in any of the State legislatures to which it was sent for ratification, as to whether that Amendment conceivably excluded the death penalty. And as to its testing against the Constitution, it would appear that the question would have come up prior to this almost 200th year of our national history, if it had been regarded as debatable.

The "contemporary human knowledge" test which Petitioner extracts from Robinson v. California, supra, must be examined in its context in order to be a reliable guide in the present action. The Court said:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the

> light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, . . ." Id. at 666.

Thus, the Court considered the penalty to be so grossly antagonistic to contemporary human knowledge that universal thought would "doubtless" regard it as violative of the Eighth and Fourteenth Amendments. The same degree of attitude or opinion is not present in terms of capital punishment. Even Petitioner's statistics show that there is no "universal thought" in this country on its validity in the constitutional sense, or that such thought is "doubtless" a condemnatory one.

II

THE "INDICATORS" OF UNACCEPTABILITY OF DEATH AS A PENALTY ARE NOT RELIABLE YARDSTICKS, ARE NOT RELEVANT OR APPROPRIATE YARDSTICKS, AND DO NOT PROVIDE ACCURATE MEASURES FOR DETERMINING THAT STANDARD OF DECENCY BEYOND WHICH STATES MAY NOT GO IN FIXING PUNISHMENT.

It has been demonstrated that the antagonist has failed to take into account the due process aspect of the question before the Court, and the perimeters of that aspect have been explained. It has also been pointed out that the interpretation by the antagonist, of the tests heretofore enunciated and applied by this Court in construing the "cruel and unusual punishment" prohibition, has been too narrow and has sought to restrict the Court to a simple present pulse-taking. A proper perspective of the question would sustain the punishment imposed, when history, experience, and purpose are scrutinized within the light of present knowledge. Leave that for the moment, however, and turn to the "proof" which Petitioner offers. It fails even the tests which he has proposed; that is, it fails to show that the standard which he has outlined is not being met by the State.

The premise which Petitioner attempts to prove, and which he says spells the doom of capital punishment, is that the death penalty has a fatal characteristic, i.e., "extreme contemporary rarity resulting from a demonstrable historical movement which can only be interpreted fairly as a mounting and today virtually universal repudiation." 16/ The following objective indicia, he asserts, all point to unacceptability by contemporary standards:

(1) The suggestion is made that there is a world-wide trend towards disuse for civilian crime, a de facto abolition.

Firstly, by excluding military crimes from discussion, Petitioner attempts to artificially limit the scope of the Eighth Amendment which, as exemplified by its application to wartime desertion in the case of Trop v. Dulles, supra, admits of no such restriction. What this distortion does is allow the argument to be made that the death penalty has been "abolished" in many countries. Petitioner has failed to point out that

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16/ Aikens Brief, p. 12.

it has been almost universally retained for war-time crimes or treason. 17/ The legislative restrictions on the use of the death penalty in this and other countries certainly do not constitute "abolition". It presents rather a matter of degree. Thus the moral and legal absolutes presented in Petitioner's Brief are hedged, he having excluded at the outset an entire class of crimes the inclusion of which would weaken his argument. Petitioner has tacitly admitted by this exclusion that the death penalty has not been outlawed but has at the most been restricted.

It is highly questionable, secondly, whether the international picture is an appropriate measure of whether a State has contravened our Federal Constitution. Although the Court in Trop took cognizance of the non-acceptability by civilized

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17/ United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968).

nations of the world of statelessness as a punishment for crime, the penalty of denationalization in that case was of a peculiarly international character and involved the international political status of the person. Thus, the law of other nations was uniquely pertinent. It is not so with the penalty of death, which does not involve an individual's citizenship relationship with his country or others. The same Trop opinion, moreover, comments on the death penalty in terms of "our", meaning our Nation's, history.

It was to the States that Mr. Justice Frankfurter looked in Solesbee v. Balkcom, 339 U.S. 9 (1950). In the dissent he tested the due process problem:

> "The manner in which the States have dealt with this problem furnishes a fair reflex, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death." Id. at 21.

In Weems v. United States, supra, 217 U.S. at 380-381, the Court compared the Philippine punishment, for Eighth Amendment purposes, only with the law of

the United States and with other punishments in the Philippines.

Further, Petitioner cites no authority for the proposition that the Framers intended the test of "cruel and unusual punishment" to be a poll-taking of other countries' use of a particular punishment. It is unlikely that such a concept was envisioned.

And it cannot be said that the reports cited by Petitioner 18/ indicate a world-wide repudiation of such certainty that the death penalty contravenes the very dignity of man. Great Britain only abolished it after a trial period which indicates its own hesitancy, and Canada is still undergoing a five-year experiment that will expire unless affirmatively acted on by its Parliament. 19/ Such built-in vacillation

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18/ Aikens Brief, p. 27, fn. 46.

19/ See report of the "Limitation of Death Penalty in Canada" by J. R. Mutchmor, Christian Century, January 24, 1968, Vol. 85, page 120. Just prior to the enactment of the experimental abolition in Canada, the death penalty was retained by

(continued on next page)

by the two countries whose underlying philosophies are most closely allied with our own refutes the implication that our country alone remains barbaric.

In addition, the circumstances of other countries may indeed permit them to abolish the death penalty; their crime rates and penal facilities, their systems of criminal law and their underlying concepts of crime, themselves undoubtedly each affected the decision to abolish. Thus, the mere number of such foreign countries have no effect on the constitutionality of what, in most of these United States, is regarded as a legitimate and needed penalty for crime.

(2) The Petitioner alleges that the countries have abandoned capital punishment because of their concern with fundamental human decency, which he says is illustrated by an intense concern of religious groups, a crusade fervor with which the forces against the death penalty have moved, and anti

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a vote of 143 to 112 despite the fact that Prime Minister Lester Pearson and the leaders of all other major parties favored abolishing it. "Time", April 15, 1966, Volume 87, page 40.

capital punishment opinions of highly respected persons. Bedau lists examples of literature stating the case for capital punishment. 20/

The "objective indicator" which is thus put forth is merely contrived as a bald conclusion. Without a careful study of the circumstances under which a foreign country designed to discontinue use of the death penalty, it cannot be surmised that its reason was that which Petitioner wishes it to be. A conclusion, especially of the magnitude made by Petitioner in this regard, cannot reliably be drawn from a small and carefully selected set of illustrations, especially ones that do not even accurately portray what they portend to. For example, the fervor of crusade alluded to is indicative of most, if not all, attempts to reverse time-honored and traditional concepts and practices. It does not "show" that the reason for abolition is basically a concern with fundamental human decency. It goes without saying that forces

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20/ Bedau, The Death Penalty in America (Rev. ed 1967), p. 120. See also, Bernard Lande Cohen, Law Without Order (1970).

destructive of society are also often imbued with the fervor of a crusade.

(3) Petitioner condemns what he regards as the mainstay of support for the death penalty. This "indicator of unacceptability" is the belief in retribution, atonement, or vengeance. The implication is that such is not a legitimate purpose.

In the first place, punishment for its own sake is not regarded in law as unconstitutional. The Court in Trop referred to this in finding that the purpose of denationalization was simply to punish the deserter: "There is no other legitimate purpose that the statute could serve," the Court concluded. "Here the purpose [of the law] is punishment, and therefore the statute is a penal law." Trop v. Dulles, supra, 356 U.S. at 97. Mr. Justice Brennan, in his concurring opinion in Trop, indicated that if the sole purpose of punishment was retribution, the punishment was not a valid one. Not incidentally, in discussing the purposes of the penal law, he noted that the thought of death as a penalty would serve the legitimate purpose of deterrence. Trop v. Dulles, supra, 356 U.S. at 112.

It is patent that the death penalty serves a number of legitimate ends of punishment, contrary to Petitioner's contention. Such recognized purposes are deterrence of the wrongful act by threat of punishment (Trop, supra, concurring opinion of Mr. Justice Brennan, 256 U.S. at 111-112; Robinson, supra, dissent of Mr. Justice Clark, 370 U.S. at 68; Powell v. Texas, 392 U.S. 514, 530 [1968]); the protection of society itself and of its members (Solesbee v. Balkcom, supra, 339 U.S. at 13; Robinson, supra, concurring opinion of Mr. Justice Douglas, 370 U.S. at 677; Trop, supra, Mr. Justice Brennan concurring opinion, 256 U.S. at 111-112: included as a purpose of the penal law is the insulation of society from a dangerous individual by imprisonment "or execution"); the repression of crime and prevention of repetition (Weems v. United States, supra, 217 U.S. at 381).

How can it possibly be said that the death penalty does not act to deter would-be crime perpetrators from carrying out their schemes? In Powell, supra, 392 U.S. at 531, the Court presumed that the very existence of criminal sanctions serves to reinforce condemnation of murder, rape and other anti-social conduct. It cannot, on

the other hand, be presumed that the threat of death has not stayed the hand and saved the life, simply because the penalty has failed to deter those who commit capital felonies. Statistics could never be gathered to prove how many capital crimes were averted by the existence of the death penalty, for no census gatherer or poll-taker could persuade even one person to admit that he would have committed a murder, or rape, or an armed robbery, or a kidnapping, but for the knowledge that he could have received the death penalty! It is in the very nature of man to recoil the most strenuously from forfeiture of his life. Although this deterrent effect cannot for lack of knowledge be measured in terms of the numbers of capital crimes NOT committed, other indications of the prevailing belief in the superior deterrent effect of the death penalty are recitable:

a) Six of the states which have partially abolished the death penalty have retained it for certain crimes. New York, Vermont, North Dakota, and Rhode Island are particularly notable for retaining it for murders committed by certain prisoners, and New York and Vermont retain it also for murder of a police officer or certain persons in[21]

21/ NPS, p. 30.

the prisons. What primary purpose could these carefully selected exceptions have other than deterrence? Certainly the exceptions do not bear witness to a greater value being placed on some victims' lives than on others. The resultant disservice of such circumscription as New York placed is tragically illustrated by the recent prison uprising in which a woefully large number of persons, some civilian, were killed; it is doubtful that all of the prisoners responsible were "lifers". New York's law, however, arbitrarily limits the death penalty "for persons found guilty of killing a peace officer who is acting in the line of duty, and for prisoners under a life sentence who murder a guard or inmate while in confinement or while escaping from confinement."22/

b) The threat of the death penalty for armed robbery palpably serves as a deterrent; it is common knowledge that robbers frequently accomplish their evil ends with unloaded weapons. Can it be said that this is not because they are aware that an armed robbery can draw the death penalty but an unarmed robbery cannot? 23/

22/ NPS, p. 30.

23/ Criminal Code of Georgia, §§ 26-1901 and -1902.

A burglar, too, realizing that he risks the death penalty if in the course of his venture, his gun goes off and someone is killed, may well be persuaded to guarantee against that possibility.

c) The deterrent value of the death penalty vis-a-vis other penalties was documented at some length in the Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, on S. 1760, March 20, 21, and July 2, 1968, pages 187-192 of the Report. The deterrent effect was shown by evidence of experience, by the psychology of deterrence, and by statistics.

(4) The next insupportable "indicator" is Petitioner's statement that the United States has overwhelmingly rejected the death penalty as shown by the decreasing trend of executions since 1930 even though many jurisdictions retain the death penalty on the books.

This is grossly misleading. In the first place, the fact that only fourteen states of fifty [25] have

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25/ This and the other statistics mentioned in this section are drawn from NPS, Table 15, p. 30. (continued on next page)

abolished the death penalty either partially or completely cannot be explained away by saying that the majority have it only on their books but do not actually use it. The fact cannot be escaped that America is not yet ready, if ever it will be, to abandon capital punishment altogether. It is not prepared to do that even by legislative action, much less by constitutional fiat declaring it contrary to the fundamental concepts of ordered liberty.

The retention states have not ignored the law that is on their books nor the question now being posed. Eleven states have experimented with abolition and have subsequently restored the penalty, and of those eleven, only three reabolished it and one of those reabolitions occurred in the Nineteenth Century. In the forty years from 1917 to 1957, only the state of Missouri abolished the death penalty, and it was restored in that state in 1919 and

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Also, N. M. Stat. Ann. (1969 Cum. pocket part) § 40A-29-2.1. (Aikens Brief, App. G. p. 9 g.).

remains in force. Since 1947, when Louisiana ex rel. Francis v. Resweber, supra, was decided, only seven states have abolished the death penalty while two enacted partial abolitions. One of the seven, Delaware, restored the penalty after three years' experience. Viewed in another perspective, in the thirteen years since Trop v. Dulles, supra, only four states abolished the death penalty, plus the two which adopted partial abolition. It is therefore stretching the point to incredulity to say that the penalty has been overwhelmingly rejected in this country, or that there is any "trend" in this regard.

Affirmative displays of desired retention have recently been demonstrated by the Illinois referendum in December, 1970 26/ and by the results of an extensive study undertaken in Georgia by Study Committees of the

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26/ Reported in "Newsweek," January 11, 1971, pp. 23, 24, 27.

Senate and of the House in 1966 and 1967.27/ Public hearings were held in a number of locations throughout Georgia, written material on the subject was examined, persons responsible for administration of the penal laws were queried, and inquiries were made of the states classified as having abolished capital punishment, with respect to their crime rates before and after abolition and with respect to life imprisonment as the maximum penalty. Based on these studies, the majority reports of each of the Committees recommended retention of the death penalty.

Other clear indications of the Nation's attitude and opinion, which must have at least some bearing on the "standards of decency" which the

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27/ 1966 House Journal, p. 2669, contains the Senate Report; 1968 House Journal, p. 3451, contains the House Report. The Senate Committee was created pursuant to Senate Resolution No. 107. Senate Journal 1965, p. 1226. The House Committee was created pursuant to House Resolution No. 3, House Journal 1967, p. 15.

community embraces, are the results of numerous polls. The polls collected by Erskine in 34 Public Opinion Quarterly (1970-71) bear witness to the high percentages of persons in this country who favor capital punishment. The Gallup polls indicate a rise from 45% to 51% "For Capital Punishment" between the years 1965 and 1969. "Time" magazine on June 6, 1969, pp. 26, 27, reported the results of a Louis Harris poll which indicated that 48% of the Americans questioned favored capital punishment while 38% did not. Among men, 58% favored it and among women, 40%. "Nation's Business" reported in its November, 1970, issue, vol. 58 p. 28, that the results of its October invitation to "Sound Off to the Editor" on "Should the death penalty be abolished?," were that four out of five replies were "no". The readers in this case were of course primarily businessmen. Taking into account that most states and the federal government retain the death penalty, it is significant that the much touted opposition did not take advantage of the opportunity to show their numbers in this poll. The vote was notably nearly two to one in favor of the death penalty in a poll undertaken by a national women's magazine, "Good Housekeeping", and reported in the November

1969 issue, vol. 169 p. 24. 62.1% favored it and 35.8% were against it; only 2.1% reported "no opinion".

The Court in Trop, supra, was therefore demonstrably correct when it stated that the death penalty is still widely accepted in this country, and Petitioner's attempt to discredit that statement or prove that it is no longer valid falls short of its goal. Although polls are not solid proof, they are an acceptable barometer when an "indication" will suffice for the purposes of the question in inquiry. The Court allowed as much in Witherspoon v. Illinois, 391 U.S. 510, 520, fn. 16 (1968).

Petitioner overlooks the most significant and reliable measuring device, and the one that is more pertinent to this inquiry than any other. That is the contemporary American jury. The Court itself pointed to this keystone in Witherspoon v. Illinois, supra, 391 U.S. at 519-520:

> "Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do

> little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death...."28/

Let us look at what the juries are doing in this country. In 1968, 102 persons received the death sentence; in 1967, 85 persons were so sentenced; in 1966, 118 death sentences were imposed; in 1965, 86; in 1964, 106; in 1963, 93; in 1962, 103; in 1961, 140. 29/ Thus, in only eight years of the last decade,

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28/ "And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system, a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

29/ NPS, Table 4, p. 12.

833 persons received the death sentence in the United States. Assuming that in all cases it was a jury which made the determination of this penalty, the total number of persons thus selected by the random methods employed to obtain jurors representing a fair cross-section of the community amounted to 9,996 or almost ten thousand persons! Keeping in mind that these conscientious people, sworn to dispatch the solemn duties of meting out justice, were faced with actual cases and real defendants, and that they deemed the death penalty appropriate in a very real sense and through a very personal involvement in the debate, the significance of these figures is indisputable. It is abundantly evident, therefore, that the people do not believe that we can afford to dispense with the death penalty as an effective weapon against crime in our society.

The juries in the two Georgia cases at bar were selected in accordance with the requirements of Witherspoon v. Illinois, supra, (A. 12-15). Insofar as the penalty was concerned, only those prospective jurors who stated in voir dire that they would not even consider returning a verdict in accordance with the maximum provided by law, were excluded for cause.

In Furman's case, only one member of the panel of 48 was disqualified for this reason. So out of 49 persons randomly selected to represent the community by jury duty, only 2%, when faced with a specific case in which the decision as to punishment would be his, affirmatively indicated that he would refuse to impose capital punishment regardless of the evidence (A. 13). Even the juror who indicated a general opposition to capital punishment saw fit to impose the penalty in this case (A. 12, 21). In Jackson's case (No. 69-5030), of a total of 60 prospective jurors submitted to the voir dire, 12, or only 1 out of 5, similarly were disqualified (A. 33-37).

In Georgia, 33 persons are currently under death penalty (App. C, pp.1-6). All were sentenced by juries. Eight were sentenced within the last two years.

The attitudes of the community thus reflected show conclusively that the death penalty is far from being rejected, much less "overwhelmingly rejected", and is certainly not universally thought of in this country as being contrary to standards of decency.

(5) Petitioner misconceives the conclusion he draws from the data concerning the number of executions in the United States in recent years. The penalty, he says, is no longer in actual use because the incidence of executions is "freakishly rare". The conclusion that this is the result of "prevailing" abolitionist sentiment is undocumented and insupportable. Contrarily, it is demonstrable that there have been fewer executions recently because the condemned criminals have averted the carrying out of the penalty by pursuing a variety of appeals and other post-conviction proceedings. The proper conclusion to be drawn is that our system of law is increasingly providing greater and wider opportunity for the convicted defendant to challenge the proceedings which ultimately resulted in his sentence. The perfection of our system of criminal justice is the apex sought as we constantly strive for the greatest degree of fairness. The advancement well known to this Court need hardly be given illustration. It is marked by requirements tending towards greater impartiality of juries and their freedom from prejudice or discrimination, by safeguards against involuntary confessions and erroneous lineup identification, by provision for effective assistance of counsel for all who are charged with crime. This advancement, which assures

more than ever before that a man will be afforded due process by a full panoply of protections, also allows review of his trial to a greater degree, by more tribunals, and subject to a finer scrutiny through the use of verbatim transcripts and post-conviction evidentiary hearings. And that development, taken advantage of by prisoners whether under prison terms or under death penalty, bears most heavily on the carrying out of executions in recent years.

The status of persons subject to capital punishment in Georgia provides a concrete and irrefutable picture which is likely repeated in state after state. Limitations of time and information prevent a revelation of such scope here. In Georgia, however, there are actually 33 persons now under death penalty. This number is not reflected in the published statistics because many of the prisoners are in county jails rather than in the State penitentiary, since it is the policy of Georgia to retain a man locally while he has legal proceedings pending. Ga. Laws 1956, pp. 161, 171, as amended; Ga. Code Ann. § 77-309(c) and (d) (App. A, p. 13a).

By the same token, condemned prisoners are generally to be sent to the State penitentiary not more than twenty days nor less than two days prior to the date set for execution. Ga. Laws 1924, p. 195; Ga. Code Ann. § 27-2514 (App. A, pp. 8a-9a). During periods of stays of execution, prisoners are to be incarcerated in the jail of the sentencing county. 30/ As described in detail in the chart submitted at Appendix C, of the 33 present cases, 13 persons currently have petitions for certiorari pending before this Court, 7 have motions for new trial pending before the trial courts, 5 have habeas corpus proceedings in motion or on appeal, and 2 have executions stayed. One person is in prison out-of-state and 3 are awaiting the setting of new execution dates. 31/ The court proceedings in progress involve numerous

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30/ Opinions of the Attorney General of Georgia, 1959, pp. 245-246.

31/ App. C, p. 10c.

alleged grounds, the variety of which demonstrates that the decisions in the cases now before the Court may very well not affect any of them. (App. C, pp. 1-6).

It is plain, at any rate, that it is not public opinion that has caused a cessation in executions but rather an expansion of post-conviction remedies which are being invoked to a greater degree. The fallacy of Petitioner's conclusion concerning public opinion is also pointed out by the numbers of persons sentenced to death in the last few years. 32/ It is contrary to common sense to conclude that the juries which imposed capital punishment on 102 felons in 1968 did so in the belief or hope that the penalty would not be carried out. 33/

As to Petitioner's assertion that the death penalty is a southern phenomenon, it is noted that although the "South" is classified as one of five geographi al groups, it comprises one-third of the fifty-two jurisdictions

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32/ Supra, pp. 62-63.

33/ NPS, p. 12.

counted. 34/ It is more to the point of this case, however, that mere geographical predominence does not render a penalty constitutionally prohibited. The fact that the northern state of New York retains the death penalty only for persons found guilty of killing a peace officer who is acting in line of duty and for prisoners under life sentence who murder a guard or inmate while in confinement or while escaping from confinement 35/ does not render Georgia's retention of the death penalty for the murder of anyone unconstitutional. A harsher sentence in one state does not make it cruel and unusual for that reason. As the Court observed in Howard v. Fleming, supra, 191 U.S. at 136, in sustaining a state sentence against an attack that it was cruel and unusual:

> "If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to

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34/ Aikens Brief, p. 38.

35/ NPS, Table 15, p. 30, note (a).

be congratulated, not condemned."

(6) The "rarity" which is alluded to in the abortive attempt to disprove the generally wide acceptance of the death penalty as a viable tool of crime prevention and criminal justice in this country, has previously been put in its more accurate perspective. The faulty conclusions relied on in this regard therefore miss wide the mark. As reemphasized lately by the Court in McGautha v. California, supra, 402 U.S. at 213 : ". . . it requires a strong showing to upset [a] settled practice of the Nation on constitutional grounds." Even Petitioner admits that the "rarities" he proffers only "imply" American unacceptance of the death penalty for consideration by the Court of the constitutional issue at hand.36/

36/ Aikens Brief, p. 39.

And the implications from the public opinion polls might, more logically than Petitioner concludes, be that Americans are alarmed by the growth of crime in their country and by the evidences of disrespect for the law which they see around them.

We say "more logically" because it does not stand to reason, as Petitioner contends, that a polled person will indicate an opinion contrary to what Petitioner purports is a universal attitude, meanwhile harboring a belief against capital punishment. What could possibly induce the polled public to speak for capital punishment and deliberately take what Petitioner regards as an unpopular and "condemned" stand? It stands to reason, instead, that the polled public means what it says and that the "overwhelming rejection" is a fiction. Thus, the "swings in public opinion" referred to by Petitioner 37/ may instead reflect a belief that the lack of actual carrying out of death sentences

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37/ Aikens Brief, p. 39.

imposed in the last several years is directly related to the rise in the rate of serious crimes.

(7) Petitioner suggests that the number of death penalties meted out and the number of actual executions now taking place is an objective indicator that the American conscience has repudiated the penalty. Much has already been discussed in refutation, but an additional point needs to be made with regard to the number of death sentences imposed by today's juries. The proportionately fewer instances in which juries find the death penalty mandated may well indicate not their revulsion to it (or they would not impose it at all) but rather a more stringent demand for a showing of aggravated circumstances than previously. Thus, BECAUSE it is evident that juries are giving greater caution before selecting the death penalty, and BECAUSE it occurs almost exclusively in instances of heinous crime, 38/ juries are shown to reserve the death penalty for unusual cases. There is all the more reason to retain

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38/ See App. C, pp. 1c - 6c.

it as a constitutional penalty. Both the imposition and the carrying out of a death penalty in this country today are surrounded with greater safeguards and humanitarian considerations than have existed in the past. The expanded guarantees of due process, as well as the increasingly more conscientious, knowledgeable, and more cautious jury, give added reason for retaining rather than abolishing it. Our system of criminal justice assures more than ever before that those who are ultimately required to pay the maximum penalty will have had a full measure of due process protection and the responsible consideration of his peers. Such a framework must be regarded as adding to the constitutionality of the death penalty. That it may result in fewer actual impositions and executions should not, because of that additional due process, result in unconstitutionality of the penalty. The "cruel and unusual punishment" prohibition surely does not compel depriving the states which are concerned with ordered liberty, and the jurors who act directly on behalf of the citizens of the States, of the freedom to impose and carry out the traditionally maintained penalty of death where justified.

(8) Petitioner refers next to what he describes as a "secrecy" which envelopes executions and suppresses the truth about them from subjection to public opinion. The fact that they are not carried out in the open public objectively indicates, he intimates, that society must therefore regard this punishment as repellent.

No distinction is made between the society which Petitioner alleges is the suppressor and the society which is "unenlightened" and the society which allegedly is thus shown to consider it repugnant. It strains logic to believe that society is so chameleon, or that one hand does not know what the other hand is doing.

Moreover, it is provincial to suggest that the public does not realize the import of an execution. The numerous articles that Petitioner himself cites bear witness to the fact that a great deal of literature is put before the public to inform it of the subject. The anatomy of an execution has been repeatedly described and discussed and testified to at various public hearings, as Petitioner himself acknowledges, e.g., at footnote 89, page 45 of the Aikens Brief and Appendix I therein. Illustrative also is the type of article that appeared in "The Atlanta Journal and Constitution Magazine" last

year. 39/ The article graphically pictured and described the electric chair and procedure used in Georgia. It is notable that the reams written on the subject and directed to the public has not led to abolition of capital punishment in these United States.

As to information concerning executions, the news media policy of the State Board of Corrections is an open one. 40/ A recent pertinent example of the application of this policy was

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39/ "The Death Penalty: Have We Walked The Last Mile?", the first of a two-article series by John Pennington appearing in the issues of August 30 and September 6, 1970.

40/ Secretary of State, Official Compilation of the Rules and Regulations of the State of Georgia, "Rules of the State Board of Corrections," Sec. 125-1-2-.05; App. A., p. 16a.

the televised interview of Petitioner Lucious Jackson, Jr. (Case No. 69-5030) by NBC on the "Xerox Quarterly Report", September 8, 1971. Thus it cannot be said that knowledge of executions is suppressed.

As to the assertion that executions are carried out "clandestinely", the date of execution is made a part of the sentence itself, which is a public record. 41/ Also, the condemned person may have present, if he desires, his counsel, relatives, and such clergyman and friends as he wishes. 42/

This introduces the pivotal point regarding the fact that executions are carried out privately.

41/ A. 5, Ga. Laws 1924, p. 195; Ga. Code Ann. § 27-2514, App. A. pp. 8a - 9a.

42/ Ga. Laws 1924, p. 196; 1956, pp. 161, 182; Ga. Code Ann. § 27-2515, App. A. p. 10a.

(9) Petitioner suggests that such privacy indicates society's revulsion to public execution. That is indeed true. Such a mode of carrying out the penalty imposed is now generally considered barbaric because it unnecessarily robs the condemned man of the last vestiges of dignity. Decency calls for an abandonment of the public circus atmosphere of execution, not for the abandonment of execution itself.

The humane method predominantly invoked is regarded as sufficient to serve the purposes of the punishment. It is the obvious consensus that requiring a condemned man to make a spectacle of himself in his last hour is too great a price to extract for the additional deterrent value such a procedure might have.

No authority is advanced, nor is any known to Respondent, for the proposition that the deterrent effect of the death penalty is erased by imposing it privately. That the would-be capital felon would be deterred only by the sight of another's forfeiture of life and would not be deterred at all by the thought of the forfeiture of his own, is simply not supportable.

(10) The discretionary aspect which the death penalty now has, Petitioner contends, provides its only basis of acceptability to the public.

While it may be true that a rigid, mandatory use of the death penalty, to cover all manner of acts forbidden within the definition of a capital crime, might impose cruel and unusual punishment on a particular offender, it does not follow that individualization of penalty by the device of minimum - maximum penal laws reaches the same result. It goes without saying that the discretionary aspect of the death penalty, as well as other penalties, removes the very arbitrariness of which Petitioner complains. The feature of discretion allows the jury to take a less wooden approach to penalty. Most importantly in the context of the present inquiry, it allows the community standard to be more immediately felt and applied and is more direct than any change in statute. That juries do impose the death penalty under this procedure makes it abundantly evident that such is as close a reflection of community standards as is presently possible and that it is not, moreover, a result of insensitive or slow-moving legislative directive. The function of the jury as maintaining a link between community values and the penal system is noted in Witherspoon v. Illinois, supra, 391 U.S. at 519.

(11) Another indefensible "indicium of unacceptability" is Petitioner's reference to the identity of death penalty prisoners.

Petitioner admits that evidence supporting his theory cannot be brought forth. This omission in itself is fatal to the premise because the burden is his to establish the unconstitutionality claimed. 43/ Certainly he cannot do so by mere innuendo.

Moreover, it can hardly be presumed that the juries in this country have conspired to sentence only certain classes of persons within our society, or that the juries responsible for the death penalties now outstanding were infected with an impermissible discrimination. If the Petitioner in any case now before the Court believes he was unconstitutionally discriminated against because of his status in society, he has not shown so. And the tools for doing so have been made clear and available. See Whitus v. Georgia, 385 U.S. 545 (1967); Witherspoon v. Illinois, supra.

43/ McGautha v. California, supra, 402 U.S. at 203.

In addition, safeguards against arbitrariness or other lack of due process for disadvantaged persons have increased substantially in the last several decades. Added to those previously mentioned is the right to effective assistance of counsel for the indigent, to cite just one.

It is submitted that if it appears that those receiving the death penalty fall primarily into one particular class or another, it is not because of some rampant discrimination but rather because the rate of capital felonies is proportionately higher by far among such groups. The 1970 Annual Report of the Atlanta, Georgia, Police Department 44/ shows in that year a total of 55 murders committed by white persons and 187 murders committed by Negro persons. 45/ Thirty-one persons were killed by white assailants, and one-hundred eighty-seven persons were killed by Negro assailants.46/

44/ City of Atlanta Department of Police, 91st Annual Report, December 31, 1970.

45/ Supra, p. 15.

46/ Supra, p. 15.

Eighty-eight cases of rape by a Negro male were booked, while the total for white males was 18. 47/ The facts are thus destructive of the presumption.

(12) Petitioner asserts that since the legislatures have failed for various reasons to give expression to the public conscience in this area, the Court must do so.

As has been demonstrated, however, the public conscience has not condemned the death penalty per se. Nor have the courts. The decisions of the state high courts have consistently upheld the death penalty against claims that it is contrary to the cruel and unusual punish-

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47/ Supra, p. 41.

ment provision of the Constitution. 48/

48/ Recent cases holding that the death penalty is not cruel and unusual punishment are: Butler v. State, 285 Ala. 387, 232 S.2d 631 (1970); State v. Davis, 158 Ct. 341, 260 A.2d 587 (1969); Rivers v. State, 226 S.2d 337 (Fla. 1969); Wilson v. State, 225 S.2d 321 (Fla. 1969); Massey v. State, 222 Ga. 143 (1966); Sims v. Balkcom, 220 Ga. 7 (1964); People v. Walcher, 42 Ill.2d 159, 246 N.E.2d 256 (1969); State v. Crook, 253 La. 961, 221 S.2d 473 (1969); Bartholomey v. State, 260 Md. 504, 273 A.2d 164 (1971); Duiser v. State, 441 S.W.2d 688 (Mo. 1969); State v. Calhoun, 460 S.W.2d 719 (Mo. 1970); State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969); State v. Kelback, 23 Utah 2d 231, 461 P.2d 297 (1969); State v. Cerny, 480 P.2d 199 (Wash. 1971).

Such an objective indicator as a survey of state judicial consideration and pronouncement provides a most relevant and appropriate yardstick.

It is thus abundantly clear that Petitioner has failed to make that strong showing required to upset the settled practice of the Nation on constitutional grounds. McGautha v. California, supra, 402 at 203, and the cases cited therein.

III

CAPITAL PUNISHMENT IS AN APPROPRIATE MAXIMUM PENALTY FOR MURDER IN OUR SOCIETY TODAY AND ITS USE IS NOT FORBIDDEN TO THE STATES AS CRUEL AND UNUSUAL PUNISHMENT IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

It was submitted at the outset of this discussion on "indicators" 49/ that, in addition to the fact that Petitioner has not made his case, a proper perspective of the question would of itself sustain the death penalty as a punishment, when history, experience, and the light of present knowledge are scrutinized. These criteria, posed in McGautha v. California, supra, 402 U.S. at 207-208, as the relevant factors to be considered, soundly indicate that the death penalty should not be declared offensive to the Constitution. The purposes of the death penalty as a means of controlling crime and protecting society have already been discussed, and the country's long experience with it does not teach that it has no relevancy to these goals. The experience of those states which have deleted it from their laws has provided a track record of over

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49/ See p. 45.

fifty years in some instances, and yet that experience has not persuaded the great majority of states to join them.

As to history, this Court has on a number of occasions examined the historical context in which the Eighth Amendment was adopted. 50/ It is clear that at the time the amendments known as the Bill of Rights were considered by Congress and subsequently by the state legislatures to which they were sent for ratification in 1789, there was no question that the death penalty was

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50/ Ex parte Kemmler, supra, 136 U.S. at 446, et seq.; O'Neil v. Vermont, supra, 144 U.S. at 339 et seq.; Weems v. United States, supra, 217 U.S. 368, et seq.; 389, et seq.; Trop v. Dulles, supra, 356 U.S. at 100. See also Farrand, The Records of the Federal Convention of 1787, Vol. I, Yale University Press, 4th Printing 1934; Rutland, The Birth of the Bill of Rights, 1776-1791, University of North Carolina Press, 1955, Perry and Cooper, Sources of Our Liberties, American Bar Foundation, 1959.

not regarded as cruel and unusual punishment. The same First Congress which adopted the Bill of Rights approved an act setting the punishment for certain crimes against the United States, on April 30, 1790. It provided the penalty of death for a number of crimes, including treason (Section 2), murder (section 3), a number of high seas crimes (sections 5 and 9), rescue of a capital felon (section 23), forgery of, and other crimes related to, public securities (section 14), and others. 51/

From that early time until this, the death penalty has been an integral part of our penal system, and has been accepted as a legitimate and necessary instrument in the exercise of the right of the sovereign to protect itself and its constituents. This Court has itself given what appears to be tacit approval of the penalty as a means, both in some of the cases hereinbefore discussed in such later cases as Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

51/ Annals of Congress, Vol. II, Appendix pp. 2274, 2281.

The crux of the matter is that nothing appears in the instant cases to compel, or even to warrant, a reversal of this development.

IV

THERE IS NO ISSUE IN THIS CASE CONCERNING PETITIONER'S MENTAL CONDITION AT THE TIME THE SENTENCE WAS IMPOSED BECAUSE (1) NO QUESTION WAS RAISED AT ANY STAGE OF THE PROCEEDINGS BELOW, EITHER AT TRIAL OR SUBSEQUENTLY, AND (2) THERE ARE NO FACTS WHICH CAST ANY REAL DOUBT ON PETITIONER'S MENTAL COMPETENCY AT THE TIME OF SENTENCING; RATHER THE RECORD PLAINLY SHOWS OTHERWISE.

Petitioner attempts to raise at this juncture a challenge to his mental "soundness" in September, 1968, when he was tried and sentenced. In terms capable of application in a legal sense and relevant to a judicial inquiry, he apparently refers to mental competency.

It has been pointed out in Respondent's Statement of the Case [52] that the question is a new one in the long history of this case. No mention at all was made of it at trial. The record is vacant of any comment whatsoever in this regard. Had counsel thought him incompetent, he surely would have made some mention of it before or during the

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52/ Supra, pp. 10-11.

course of the trial. He had instigated psychiatric examination of Petitioner in October, 1967, shortly after the crime was committed (A. 6, 8), but following Petitioner's return to the court in April, no assertion appears during the months of preparation which culminated in the September trial. No plea of insanity was made [53], nor was any defense of insanity offered. Not the slightest bit of evidence appears. Nor was any complaint made in this regard in the motion for new trial or in the amended motion for new trial. [54] The enumeration of errors submitted to the court below is also devoid of any suggestion along such line (R., unnumbered pages). Moving along, the Petition for Certiorari filed in this Court also contains no such assertion, and even the Reply Brief bears no reference. Since no complaint was made in all of the time and throughout all of the proceedings beginning with Petitioner's return for trial up until the present Brief on the Merits, no question exists which addresses itself to the consideration of this Court. Edelman v. California, 344 U.S. 357 (1957);

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[53] As provided by Ga. Code (1933) § 27-1502; App. A., p. 7a.

[54] R. 20, 34-43.

Barbour v. Georgia, 249 U.S. 454 (1919); Rules, Supreme Court of the United States, Rule 23(1)(f). Not only is there no substantial federal question, there is no question at all.

Moreover, a careful scrutiny of the record unearths no facts which cast any real doubt on Petitioner's mental competency at the time of trial and sentencing. He now alludes to two letters purportedly made a part of the record, which letters were not in the record before the court below, and he claims that they raise substantial doubts concerning his competency. Presumably he means at the time of trial and/or sentencing, although this is not made clear. The letters, even if they had been made available to the Supreme Court of Georgia, could have made no difference whatsoever in connection with its decision. The reason, as noted above, is that no point was made to which they would be relevant. Nor are the letters probative at all in terms of Petitioner's assertion here. The one dated closest to the time of trial plainly states that Petitioner was not psychotic, knew right from wrong and was "able to cooperate with his counsel in preparing his defense" (Petitioner's Brief, App. A, p. 3b).

The record, on the other hand, demonstrates Petitioner's competency. Although he may not have understood the legal terminology or concepts when first questioned by his counsel and the court, he obviously understood plain English and made the determination to tell the jury his side of the story (A. 50-55). To say that he did not comprehend the nature of the proceedings against him, or that he was unable to assist counsel in the preparation of his defense, is thus baseless.

V.

GEORGIA LAW SAFEGUARDS AN INSANE MAN FROM EXECUTION

Petitioner moves from his contention regarding competency at time of sentencing to insanity at the time of execution. If that be his concern, again there is no cause for the Court's consideration of the matter. The State wholeheartedly agrees with the assertion that the execution of an insane person would offend basic precepts of humanitarianism. It has provided statutory avenues designed to prevent such a miscarriage. The record indicates that none have been pursued on Petitioner's behalf, and therefore he cannot assert before this Court that the State has deprived him of due process or thereby inflicted a cruel and unusual punishment on him. He has not, to put it succinctly, exhausted his remedies, and therefore, any question in this regard that might arise is not only not ripe for review, it has not yet been born.

The safeguards referred to provide for an investigation into the sanity of the person under death penalty. Ga. Laws 1960, pp. 988, 989; Ga. Code Ann. § 27-2602. Ga. Laws 1874, p. 30; Ga. Code Ann. §§ 27-2603 and 27-2604.

This procedure is mentioned by Petitioner at page 18 of his brief and is recited in Appendix A thereto, page 3a. However, he omits recital of section 27-2603, which may be found herein in Appendix A, p. 10a. It is a special procedure provided for capitally sentenced felons and its substance has been reviewed and approved by this Court. Solesbee v. Balkcom, 339 U.S. 9 (1949). In all other cases, the authority to transfer mentally ill inmates is vested in the State Board of Corrections, the procedure to be set out by the Director. Ga. Laws 1956, pp. 161, 173, as amended; Ga. Code Ann. § 77-310(d); App. A., pp. 14a-15a. Opinions of the Attorney General, 1968, No. 68-136, p. 162.

The legal test of insanity, for purposes of determining whether an allegedly insane convict should be executed, as applied in a Governor's investigation, is as follows:

> "Whether the prisoner after conviction has the mental ability to comprehend: (1) the offenses for which he was tried; (2) the nature of and the reason for the punishment to be imposed upon him; and (3) any facts or circumstances whch might make his punishment unlawful,

> and whether he has the ability to make these facts or circumstances known either to his counsel or to the court." Opinions of the Attorney General, 1968, No. 68-310, p. 443. See also Brown v.State, 215 Ga. 784 (1960); Solesbee v. Balkcom, 204 Ga. 122 (1949), affirmed 339 U.S. 9 (1949).

There is thus no cause for complaint in this regard.

Even if there had been raised any question concerning Petitioner's mental condition at the time of imposition of sentence, Georgia law provides for judicial inquiry in such a case. 55/ The trial judge may, in its discretion, order a mental or psychiatric examination.

Due process does not require, as a matter of constitutional law, the type of inquiry suggested by Petitioner, nor should it. Petitioner demands judicial examination into, and determination of, whether he is competent to be executed and whether he is mentally capable

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55/ Ga. Laws 1889, p. 156; 1950, p. 427, 428; Ga. Code Ann. § 24-3005; App. A., p.2a.

of receiving a death sentence. Such considerations, even with the assistance of medical experts, would be impossible of calculation. Who could possibly foretell what effect the imposition of a particular sentence will have on a man's sanity? By what gauge could it be ascertained what his mental condition will be in the future at time of execution? There is, moreover, nothing in this case which would indicate on hindsight that the sentence should not have been imposed due to its effect on Petitioner's mental condition.

Finally, there is no valid connection between (a) the lack of a sua sponte judicial inquiry into Petitioner's mental capacity to receive sentence and (b) the constitutional prohibition against cruel and unusual punishment. The question, if there had been one in this case, would direct itself to the requirements of due process, as in Solesbee v. Balkcom, supra, and not to the Eighth Amendment.

CONCLUSION

It is unavoidably clear that the imposition and carrying out of the death penalty in this case does not constitute cruel and unusual punishment in violation of the Eighth and Fourteenth

mendments, and that the judgment of the upreme Court of Georgia should be affirmed.

Respectfully submitted,

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I, Dorothy T. Beasley, Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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This _____ day of September, 1971.

_____
DOROTHY T. BEASLEY

APPENDICES

APPENDIX A

STATUTORY PROVISIONS AND RULES INVOLVED

Ga. Code Ann. (1970 Cumulative Pocket Part) § 6-805. Preparation of record for appeal; reporting of evidence and other matter when narrative form used. - (f) Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties, and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission of misstatement shall be corrected, and, if necessary, that a supplemental record shall be certified and transmitted by the clerk of the trial court. The trial court or the appellate court may at any time order the clerk of the trial court to send up any original papers or exhibits in the case, to be returned after final disposition of the appeal. (Acts 1965, pp. 18, 24).

Ga. Code Ann. (1971 Revision) § 24-3005. (4872) Contingent expenses of superior court; payment.--Any contingent expenses incurred in holding any session of the superior court, including lights, fuel, stationery, rent, publication of grand jury presentments when ordered published, and similar items, such as taking down testimony in cases of felony, etc., shall be paid out of the county treasury of such county, upon the certificate of the judge of the superior court, and without further order, provided however that the judges of the superior courts in counties having a population of 70,000 or more according to the United States census of 1940 or any future census may within their discretion order a mental or psychiatric examination made by a properly qualified psychiatrist after a person has been convicted of a crime or has pleaded guilty to a crime and before sentence is imposed, if said judge believes within his discretion that such an examination is necessary to a just and proper sentence and that the expenses of such an examination shall be paid out of the county

treasury of such county upon the certificate of the judge of the superior court and without further order. (Acts 1889, p. 156; 1950, pp. 427, 428.)

NOTE: Chatham County, Georgia, total population: 188,299. 1960 Census of Population, Vol. I, Part 12, United States Department of Commerce, Bureau of Census.

Criminal Code of Georgia (1970 Revision) § 26-1901. Robbery.--A person commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another (a) by use of force; or (b) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or (c) by sudden snatching. A person convicted of robbery shall be punished by imprisonment for not less than one nor more than 20 years. (Acts 1968, pp. 1249, 1298.)

§ 26-1902. Armed robbery.--A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years. (Acts 1968, pp. 1249, 1298; 1969, p. 810.)

Criminal Code of Georgia (1970 Revision) § 26-3301. Definition; punishment; continuing offense; jurisdiction. - A person commits hijacking of an aircraft when he (1) by use of force; or (2) by intimidation, by the use of threats or coercion, places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another, causes the diverting of an aircraft from its intended destination to a destination dictated by such person. A person convicted of hijacking an aircraft shall be punished by death or life imprisonment. The offense of hijacking is declared to be a continuing offense from the point of beginning and jurisdiction to try a person accused of the offense of hijacking shall be in any county of Georgia over which the aircraft is being operated. (Acts 1969, pp. 741, 742)

Ga. Code Ann. (1970 Cumulative Pocket Part), § 27-405 (935 P.C.) Evidence; statement or testimony of defendant. - The court shall hear all legal evidence submitted by either party, and shall always permit the defendant to make his own statement of the transaction (not under oath) if he desires to do so. The weight to be given to such statement shall be entirely in the discretion and sound judgment of the court. Whenever such statement is made, it shall be the duty of the court to reduce it to writing, and return it with the other papers to the proper court in the event of a commitment. In the alternative, however, if the prisoner wishes to testify and announces in open court before any court of inquiry his intention to do so, he may so testify in his own behalf. If he so elects, he shall be sworn as any other witness and may be examined and cross-examined as any as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue. The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure. (Acts 1962, pp. 453, 454.)

Ga. Code (1933) (1953 Revision, Ga. Code Ann.) §27-1502. (976 P. C.) Plea of insanity, how tried.-- Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law.

Georgia Code Annotated (1953 Revision) § 27-2514. Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.--Upon the conviction of any person of a crime the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death according to the provisions of this law, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay

of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction; and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of commissioners of roads and revenues, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county. (Acts 1924, p. 195.)

Georgia Code Annotated (1970 Cumulative Pocket Part) § 27-2515. Execution by warden and assistants; witnesses.--There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the condemned person so desires, his counsel, relatives and such clergymen and friends as he may desire. (Acts 1924, p. 196; 1956, pp. 161, 182.)

Ga. Code Ann. (1953 Revision) § 27-2603. (1075 P.C.) Insane convict committed to the Milledgeville State Hospital. - When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of the preceding section, the convict shall be received into Milledgeville State Hospital, there to be safely kept and treated as other adjudged insane persons. All the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to the class of cases herein provided for, so far as applicable. (Acts 1874, p. 30).

Ga. Code Ann. (1970 Cumulative Pocket Part) § 77-113. Disposition of tubercular prisoners.--When any person confined in the common jail awaiting trial for any offense against the penal laws of this State, or there confined after conviction for any such offense, or serving any jail sentence imposed upon him by authority, or there committed for any civil or criminal contempt, or serving any misdemeanor sentence under county jurisdiction in a public works camp or other institution for maintenance of county prisoners, shall be afflicted with tuberculosis, the judge of the superior court may order his delivery by the sheriff to the superintendent of the Battey State Hospital or such other institution as may be approved and supported by the State Board of Health for the care of tubercular patients, and thereupon he shall be so delivered and received, and he shall be there securely confined, kept and cared for.

The period of time such person is thus kept and confined in such hospital or institution shall be credited upon any jail sentence being served by him in the same manner as though he had remained in such jail. Any such person committed for any civil or criminal contempt while in such hospital or other institution shall remain for all

purposes under the orders, jurisdiction and authority of the court committing him for contempt in the same manner as though he had remained in such common jail. (Acts 1960, p. 769; 1964, p. 365.)

Georgia Code Annotated (1970 Cumulative Pocket Part) § 77-309(c)(d)

* * * * (c) Immediately upon the imposition of such a sentence as provided in paragraph (b) of this section and after all appeals or other motions have been disposed of so that said conviction has become final, the clerk of the court shall immediately notify the Director of Corrections of the sentence, and shall forthwith dispatch therewith, by mail, a complete history of such person upon forms provided by the Director.

***

(d) Within a reasonable time thereafter, the Director of Corrections shall assign such prisoner to a correctional institution designated by him in accordance with subsection (b) of this section. It shall be the financial responsibility of such correctional institution to provide for the picking up and transportation, under guard, of such prisoner to his assigned place of detention. . . .

(Acts 1956, pp. 161, 171; 1964, pp. 489, 490; 1968, p. 1399; 1969, p. 602.)

Ga. Code Ann. (1964 Revision) § 77-310. Classification and segregation of prisoners' establishment of separate camps; removal of women prisoners; transfer of mentally diseased and tubercular prisoners.

* * *

(d) The State Board of Corrections is authorized to transfer mentally diseased inmates from the Georgia State Prison or other institutions operating under its authority to the criminal ward or facility of the State Hospital for insane at Milledgeville, Georgia. Such prisoner shall remain at said hospital until the superintendent of said hospital declares that his sanity has been restored at which time the said prisoner shall be returned to the custody of the State Board of Corrections. At any time after completion of his sentence a prisoner detained at Milledgeville State Hospital on the ground that he is mentally diseased may petition for a trial of the question of his lunacy in accordance with the procedure provided in sections 35-236 and 35-237. Prior to completion of his sentence this procedure shall not be available to him.

Provided, however, that upon being presented with a proper certification from the county physician of a county where a person is sentenced to prison, that such person so sentenced is a dope addict or alcoholic to the extent that his health will be impaired or his life endangered without immediate treatment, the Board of Corrections is hereby directed to transfer such prisoner to the criminal ward or facility of the State Hospital at Milledgeville. Said prisoner shall remain there until the hospital authorities determine he is able to serve his sentence elsewhere.

Official Compilation, Rules and Regulations of the State of Georgia, Volume II, Rules of the State Board of Corrections § 125-1-2.05 News Media Policy. Amended. Members of the news media possessing press passes issued by the Board of Corrections may visit all institutions, without prior appointment, at any hour of the normal business day and they shall be allowed to visit any part of the institution that they desire. Such news media personnel shall be accompanied, for safety reasons, by a person so designated by the warden. Inmates shall not be interviewed without the permission of the Board of Corrections and no article or program of a derogatory nature shall be published without first giving the Director an opportunity to offer a rebuttal. Authority Ga. Constitution 1945, Art. V., Sec. V., Par. I (Ga. Code Ann., Sec. 2-3401); Ga. L. 1956, pp. 161, 170 (Ga. Code Ann., 77-307). Effective May 4, 1971. Administrative History. Original Rule filed and effective on December 31, 1969. Amended: Filed April 14, 1971; effective May 4, 1971.

APPENDIX B

CRIMES UNDER THE CRIMINAL CODE OF GEORGIA PUNISHABLE BY DEATH

Criminal Code of Georgia,

Sec.:	
26-1101	Murder
26-1311	Kidnapping
26-1902	Armed Robbery
26-2001	Rape
26-2201	Treason
26-2401	Perjury
26-3301	Aircraft Hijacking

APPENDIX C

PERSONS CURRENTLY UNDER DEATH PENALTY IN GEORGIA
SEPT. 20, 1971

(Information appears in court records and Department of Corrections files.)

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION
Arkwright, Willie	NM	36	7/16/67	7/18/67	Jury	Screven	Rape	WF, unknown to D, robbed, beaten, choked, raped 3 times by D and accomplice	Central State Hospital (for exam)
Cummings, George	NM	19	4/7/69	4/7/69	Jury	Fulton	Murder	Innocent M by-stander shot while D under influence of Red Devil	Fulton County Jail
Furman, William Henry	NM	28	9/20/68	9/20/68	Jury	Chatham	Murder	WM shot when he surprised D burglarizing his home at 2 am	Central State Hospital

Abbreviations used:

N - Negro
W - White
M - Male
F - Female
D - Defendant

APPENDIX C

RENTLY UNDER DEATH PENALTY IN GEORGIA
SEPT. 20, 1971

mation appears in court records
epartment of Corrections files.)

NTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
even	Rape	WF, unknown to D, robbed, beaten, choked, raped 3 times by D and accomplice	Central State Hospital (for exam)	Petition for writ of cert pending in US Sup Ct	Misapplication of Witherspoon; standardless jury; cruel and unusual; challenge to array; more attorney's expenses needed; challenge to Ga. change of venue procedure
ton	Murder	Innocent M by-stander shot while D under influence of Red Devil	Fulton County Jail	Petition for writ of cert pending in US Sup Ct	Unitary trial; denial of D's discovery motion; denial of D's motion to cross-examine prospective jurors concerning death penalty
cham	Murder	WM shot when he surprised D burglarizing his home at 2 am	Central State Hospital	Set for argument before US Sup Ct	Cruel and unusual, insanity at time of sentencing

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION	ST
Grantling, Charles F.	NM	22	3/24/70	3/25/70	Jury	Upson	Rape	18 yr old WF raped and severely beaten by D and accomplice knife and gun	Upson County Jail	Mo tr Up
Hart, Robert	NM	19			Jury	Fulton	Armed Robbery	NM permanently paralyzed by D's gunshot during armed robbery	Fulton County Jail	Af Su 1/
Henderson, Tommy Lee	NM	34	12/10/70	12/12/70	Jury	DeKalb	Kidnapping and Murder	WF kidnapped by D and accomplice and NM (age 27) accomplice of D	Georgia State Prison	pe wr pe Su
Jackson, Lucious	NM	24	12/10/68	12/10/68	Jury	Chatham	Rape	WF raped while D threatened her life with pair of scissors at her throat. Attempted robbery also	Georgia State Prison	Se me Su
Jackson, D.W.	NM	35	6/71	6/71	Jury	Coweta	Murder	NM (12 yrs) also shot the boy's mother and raped 14 yr old sister	Coweta County Jail	Mc tr ir

* In Georgia, the general grounds of a motion for new trial are:
1) verdict contrary to evidence;
2) verdict contrary to the weight of the evidence;
3) verdict contrary to law.

JNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
;on	Rape	18 yr old WF raped and severely beaten by D and accomplice knife and gun	Upson County Jail	Motion for new trial pending in Upson County	General grounds *
.ton	Armed Robbery	NM permanently paralyzed by D's gunshot during armed robbery	Fulton County Jail	Affirmed-Ga. Sup Ct 1/7/71	
:alb	Kidnapping and Murder	WF kidnapped by D and accomplice and NM (age 27) accomplice of D	Georgia State Prison	Petition for writ of cert pending in US Sup Ct	Standardless jury; unitary trial; application of Sims v. Georgia; exclusion of scrupled juror; cruel and unusual
.tham	Rape	WF raped while D threatened her life with pair of scissors at her throat. Attempted robbery also	Georgia State Prison	Set for argument in US Sup Ct	Cruel and unusual; standardless jury; unitary trial; misapplication of Witherspoon
eta	Murder	NM (12 yrs) also shot the boy's mother and raped 14 yr old sister	Coweta County Jail	Motion for new trial pending in Coweta Co	General grounds

new trial are:

evidence;

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION
Johnson, Edward	NM	24	9/13/69	9/13/69	Jury	Fulton	Murder	WM (80 yrs old) shot during armed robbery, D on drugs	Fulton County Jail
Johnson, Johnny B.	NM	32	5/6/69	5/7/69	Jury	Worth	Murder	WM policeman shot with shotgun during official investigation	Georgia State Prison
King, Otis	NM	20	6/23/71	6/23/71	Jury	Fulton	Murder and armed robbery	WM security guard shot during armed robbery	Fulton County Jail
Lee, James C.	NM	26	12/4/68	1/3/69	Jury	Richmond	Murder	WM medical student surprised D in act of burglary	Georgia State Prison
Lingo, Joe	NM	24	2/1/68	5/28/68	Jury	Lowndes	Murder	WM shot during armed robbery of service station at which he worked	Georgia State Prison
Manor, Robert	NM	41	9/28/68	9/28/68	Jury	Chatham	Murder	WF (age 62) had employed D. Died during rape by D	Georgia State Prison
Massey, DeWayne	WM	28	9/21/65	7/22/65	Jury	Turner	Rape	WF (age 28) beaten and raped in front of her 4 yr old child	Georgia State Prison

ABOUT IM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
s old) ng armed D on	Fulton County Jail	On appeal to 5th Cir from denial of habeas corpus	Cruel and unusual; disqualification of jurors - opinion on death penalty
man shot gun dur- ial in- on	Georgia State Prison	Hearing on petition for habeas corpus set 10/4/71-Tattnall Co	No proof of waiver; no commitment hearing; challenge to array; inadequate counsel; improper instructions; standardless jury; cruel and unusual; guilty plea-waiver of jury trial; exclusion of scrupled jurors
ty guard ng armed	Fulton County Jail	Motion for new trial pending in Fulton County	General grounds
l stu- rised D bur-	Georgia State Prison	Petition for writ of cert pending in US Sup Ct	Standardless jury; unitary trial; cruel and unusual; denial of effective counsel
uring bery of tation he	Georgia State Prison	Execution stayed by Governor 10/14/70	
2) had D. Died pe by D	Georgia State Prison	Petition for writ cert US Sup Ct	Cruel and unusual; standardless jury; involuntary confession
3) beat- ped in ner 4 yr	Georgia State Prison	Petition for writ cert US Sup Ct	Change of venue; standardless jury

ERRATUM

Name	Race and Sex
Pass, Dean E.	Should be "NM", not "WM".

Furman v. Georgia
1971 Term, No. 69-5003
Brief for Respondent

Insert between pages
3C and 4C of Appendix C

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION
McCrary, Prentice	NM	18	4/2/70	4/2/70	Jury	Upson	Rape	WF (age 18) beaten and raped, threatened with knife and gun	Upson County Jail
Miller, William Jack	NM	41	2/22/67	2/22/67	Jury	Jones	Rape	WF raped at knife point in front of aged mother	Georgia State Prison
Mitchell, John Henry	NM	24	5/19/69	5/19/69	Jury	DeKalb	Rape	WF raped by four NMs at gunpoint; had delivered child only 3 wks earlier	Georgia State Prison
Mobley, Charlie	NM	28	5/12/65	6/4/65	Jury	Burke	Murder	M, local grocer shot during armed robbery	Georgia State Prison
Moore, Robert F.	NM	39	4/14/66	4/16/71	Jury	Camden	Murder	M shot during armed robbery	Georgia State Prison
Park, A.C.	WM	82	1/68	1/68	Jury	Jackson	Murder	WM, solicitor general of county killed by dynamite attached to car	Georgia State Prison
Pass, Dean E.	WM		4/3/70	4/3/70	Jury	DeKalb	Murder	WM & WF killed when they surprised D in act of burglary	DeKalb County Jail

FACTS ABOUT VICTIM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
WF (age 18) beaten and raped, threatened with knife and gun	Upson County Jail	Motion for new trial pending in Upson County	General grounds
WF raped at knife point in front of aged mother WF raped by four NMs at gunpoint; had delivered child only 3 wks earlier	Georgia State Prison Georgia State Prison	Petition for writ cert in US Sup Ct Petition for habeas corpus pending in Tattnall Co	Jury selection; right to counsel at preliminary hearing; competence to stand trial; standardless jury; cruel and unusual Equal protection-death penalty given mostly to indigents, blacks; no counsel at line-up or setting new date. Cruel and unusual; standardless jury; challenge to array; unitary trial struck by judge
M, local grocer shot during armed robbery	Georgia State Prison	Awaiting new execution date; H-C denied by 5th Cir	
M shot during armed robbery	Georgia State Prison	Motion for new trial pending in Camden County	General grounds
WM, solicitor general of county killed by dynamite attached to car	Georgia State Prison	Petition for writ of cert pending in US Sup Ct	Confession of co-conspirators; right of confrontation
WM & WF killed when they surprised D in act of burglary	DeKalb County Jail	Execution stayed pending filing of petition for writ of cert US Sup Ct	(Enum. of Errors in Ga.Sup.Ct.) Refusal of court to accept guilty plea; objection to evidence; disqualification of jurors who would never impose death penalty; sheriff mentioned case to panel; coerced confession; no charge on insanity; improper instruction

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION
Roach, Freddie	WM		7/18/65	7/20/65	Jury	Whitfield	Rape	WF (age 25) beaten, choked, raped, threatened with knife	Georgia State Prison
Sheats, Lafayette	NM		11/2/70	11/2/70	Jury	Clarke	Murder	M shot during armed robbery	Clarke County Jail
Smith, Ronald Lee	WM	25	7/10/70	7/10/70	Jury	Spalding	Murder	M, killed during armed robbery	Spalding County Jail
Suggs, Steve B.	WM	25	10/1/68	10/1/68	Jury	Screven	Murder	WF (about age 18) killed after meeting D at dance, body horribly mutilated	Georgia State Prison
Sullivan, Julious	NM	35	3/15/67	9/25/68	Jury	Lamar	Murder	M, shot with shotgun	Georgia State Prison
Thacker, James C.	NM	24	12/13/65	12/13/65	Jury	Chatham	Murder	WM policeman shot with own gun by D who attempted to escape	Georgia State Prison
Walker, James H.	NM	25	4/17/69	4/17/69	Jury	DeKalb	Rape	WF raped by four NMs at gunpoint, had delivered child 4 wks earlier	Georgia State Prison

ISE	FACTS ABOUT VICTIM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
	WF (age 25) beaten, choked, raped, threatened with knife	Georgia State Prison	No action pending; awaiting new execution date	
	M shot during armed robbery	Clarke County Jail	Mot for new trial pending in Clarke Co	General grounds
	M, killed during armed robbery	Spalding County Jail	Mot for new trial pending in Spalding Co	General grounds
	WF (about age 18) killed after meeting D at dance, body horribly mutilated	Georgia State Prison	Petition for habeas corpus pending in Tattnall Co	Equal protection-dealth penalty mostly for indigents with appointed counsel; challenge to array; standardless jury; unitary trial; cruel and unusual
	M, shot with shotgun	Georgia State Prison	Petition for writ cert in US Sup Ct	Challenge to array; need for psychiatric exam; denial of "speedy trial" because State "knowingly" used illegal jury lists
	WM policeman shot with own gun by D who attempted to escape	Georgia State Prison	Petition for writ cert in US Sup Ct	Standardless jury; unitary trial, cruel and unusual; exclusion of those completely opposed to death penalty; challenge to array; search and seizure
	WF raped by four NMs at gunpoint, had delivered child 4 wks earlier	Georgia State Prison	Petition for writ cert in US Sup Ct	Misapplication of Witherspoon; conviction contrary to evidence; no counsel at line-up; cruel and unusual

NAME	RACE and SEX	AGE	CONVIC. DATE	SENTENCE DATE	JUDGE or JURY	COUNTY	OFFENSE	FACTS ABOUT VICTIM	PRESENT LOCATION	S
Ward, Ray	NM	29	7/21/69	7/25/69	Jury	Pulaski	Murder	WM (70 yrs old), local grocer shot during apparent armed robbery	Georgia State Prison	I v c
Williams, Venson E.	WM	37	10/7/65	10/7/65	Jury	Gwinett	Murder	3 WM policemen investigating auto theft. Shot with own guns by D & accomplice	Georgia State Prison	I v I s
Williams, Johnny B.	NM	27	7/18/67	7/18/67	Jury	Screven	Rape	WF choked and raped by D three times. Also robbed	Screven County Jail	I v I s
Ramsey, Ed	NM		9/15/55	9/15/55	Jury	Elbert	Robbery by force	No information	South Carolina State Prison (life sentence)	

Four men, one woman under death sentence were declared insane by Governor's Insanity Commission.

NSE	FACTS ABOUT VICTIM	PRESENT LOCATION	STATUS OF CASE	ASSERTED GROUNDS
r	WM (70 yrs old), local grocer shot during apparent armed robbery	Georgia State Prison	Petition for writ of habeas corpus pending in Tattnall Co	Equal protection-death penalty imposed mostly on indigents; cruel and unusual; standardless jury; unitary trial; removal of Negroes from jury
r	3 WM policemen investigating auto theft. Shot with own guns by D & accomplice	Georgia State Prison	Petition for writ of cert pending in US Sup Ct	Due process-does in camera hearing on D's request for discovery violate?
	WF choked and raped by D three times. Also robbed	Screven County Jail	Petition for writ of cert pending in US Sup Ct	Equal protection-death penalty imposed mostly on Negroes; standardless jury; cruel and unusual; burden of proving alibi on D
:y by	No information	South Carolina State Prison (life sentence)		

: by Governor's Insanity Commission.

RECAPITULATION OF INFORMATION ON PERSONS CURRENTLY UNDER DEATH PENALTY IN GEORGIA

I Description of crime for which death penalty imposed:

A Murder:

During armed robbery or burglary	10
Killing of police or security guard	4
Apparent sexual motives	2
Killing of public official (premeditated)	1
Domestic quarrel (12 yr old boy killed)	1
Killing of accomplice during kidnapping	1
Senseless slayings (no apparent motive	2
Total	21

B Armed Robbery:

D shot victim who was permanently paralyzed	1
Facts unknown	1
Total	2

C Rape

Beatings	5
In front of sensitive witness	2
During robbery (or attempted robbery)	3
Raped more than once or more than one man	4
Life threatened and endangered	all
Gun (includes 2 co-D's for same crime)	4
Knife	4
Scissors	1
Choking	3
More than one man	4
Total	10

(Adds up to more than total- some crimes involve several elements.)

TOTAL 33

II Race of defendants:

A Murder:

Negro defendants	16
Known N victims	1
Known W victims	9
White defendants	4
Known W victims	4

B Armed Robbery:

Negro defendants	2
Known Negro victims	1

C Rape:

Negro defendants	8
White defendants	2
All victims white	

III Sentended:

All by jury

IV Present location:

Georgia State Prison	19
County Jails	11
Central State Hospital (temporary)	2
Out-of-State	1

V Current Status

Motion for new trial	7
State habeas corpus	4
Federal habeas corpus	1
Petition for certiorari in United States Supreme Court	13
Set for argument in United States Supreme Court	2
Awaiting new execution date	3
Execution stayed	2
Out-of-State	1

VI Length of time since conviction:

16 years (in South Carolina State Prison)	1
6 years	5
5 years	1
4 years	4
3 years	7
2 years	6
1 year	7
this year	2